U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15May2002

CASE NO.: 2001-CAA-17

IN THE MATTER OF:

TIM SMITH

Complainant

V.

WESTERN SALES & TESTING

Respondent

APPEARANCES:

TIM SMITH, PRO SE

Complainant

JIM PROZZI, ESQ.

For the Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Clean Air Act. 42 U.S.C. § 7622, et seq., (herein the CAA or Act) and the regulations promulgated thereunder at 29 C.F.R. Part 24.

On or about August 10, 2001, Tim Smith (herein Complainant or Smith) filed an administrative complaint against Western Sales & Testing (herein Respondent) with the U.S. Department of Labor (DOL) complaining of various violations of the CAA and Occupational Safety and Health Act administered by the

Occupational Safety and Health Administration (OSHA), including his alleged July 31, 2001, termination by Respondent. (ALJX-1). On September 19, 2001, DOL advised Complainant that his complaint was being dismissed because Respondent attempted to enter into an early reconciliation with a financial settlement of the charges which Smith rejected, preferring reinstatement. Both parties decided to discontinue the investigation, opting to take the matter into another forum for resolution.

On September 19, 2001, this matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order issued scheduling a formal hearing in Amarillo, Texas which was held on January 29, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs. The following exhibits were received into evidence:[1] Complainant's Exhibits Nos. 1, 5, 6, 8, 9, 13, 19, 24, 28, 30, and 31; and Administrative Law Judge Exhibits Nos. 1-6. Respondent did not offer any exhibits of record.

Complainant and Respondent filed written post-hearing briefs on March 28, 2002. On April 8, 2002, Respondent filed a reply brief arguing Complainant's brief contains references to facts and matters not presented at the formal hearing and which are not part of the official record.[2] Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. PROCEDURAL MATTERS

Pursuant to the Pre-Hearing Order, on November 29, 2001, Complainant filed a "Submission of Allegations" as his "Complaint

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[1] References to the record are as follows: Transcript: Tr. _ _; Complainant's Exhibits: CX-___; and Administrative Law Judge Exhibits: ALJX-___.

[2] The following aspects of Complainant's brief are hereby stricken as not constituting part of the official record: his reference to hearsay evidence regarding an alleged conversation between Mr. Piehl and Tom Nystel, an OSHA representative (page 2 of brief); the specifics of his search for interim employment not otherwise contained in the record (p. 4 of brief); and factual assertions made in brief that were not presented at formal hearing relating to Complainant's request for damages for mental anguish (p. 5 of brief).

alleging in detail the nature of each and every violation of the CAA as well as the relief sought." (ALJX-3). On December 13, 2001, Respondent filed its "Answer" to Complainant's Submission denying all averments and raising five affirmative defenses. (ALJX-4).

On January 9, 2002, Respondent filed a "Motion For Partial Summary Judgment" averring that paragraphs one through seven of Complainant's Submission were not timely filed under the CAA. Since Complainant filed his complaint with DOL on August 10, 2001, any action occurring before July 11, 2001, could not serve as a basis for a timely complaint.

On January 24, 2002, the undersigned issued an "Order Granting Partial Summary Decision" with respect to the first seven paragraphs of Complainant's Submission finding that they do not constitute independent bases for alleged adverse actions against Complainant because they pre-dated the thirty (30) day period for filing a complaint under the CAA. (See ALJX-6).

However, notwithstanding the foregoing, the undersigned further concluded that to the extent any such events are material and relevant to a showing of Respondent's motivation or intent to terminate Complainant, Respondent's motion to exclude such evidence was denied.

II. ISSUES

A. The applicability of the Clean Air Act.

B. Whether Complainant engaged in activities protected under the Clean Air Act.

C. Whether Respondent discriminated against Complainant in retaliation for his alleged protected activities.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Tim Smith

Mr. Smith testified he last worked for Respondent on May 3, 2001. He is presently unemployed. He worked as a quality control manager for Respondent for five and one-half years, having been hired on October 5, 1995. (Tr. 119).

He testified Respondent was a re-test facility for compressed gas tube trailers and cylinders. (Tr. 125). His duties as quality control manager included making decals which were placed on cylinders identifying the company trailer and the cylinder product. He talked to Mr. Aderholt about doing quality control work. (Tr. 120). He also made data packs for government customers and inspected trailers for the correct paint, leaks and decals to specification.

Complainant initially testified he reported complaints to Mr. Aderholt on one or two occasions in the beginning of 2000 concerning the paint shop painting with the doors open. (Tr. 123). As a result of the painting activity, he could breathe fumes outside of the facility and overspray landed on his "new" vehicle. (Tr. 124).

On or about April 24 or 25, 2001, he reported to Mr. Aderholt that the overspray was damaging his "new" car. Mr. Aderholt responded that overspray was "just part of working at Western Sales and Testing," and if he "was going to be employed with them, that [he] would just have to accept it." Complainant observed painting occurring with the doors open on many occasions, but was motivated to complain about the overspray and fumes because of damage to his "new" vehicle. (Tr. 126). Complainant decided to contact the Texas Natural Resource Conservation Commission (TNRCC) and told Mr. Gaddy, Respondent's environmental specialist, of his intent to do so. (Tr. 127-128).

On May 1, 2001, TNRCC conducted an inspection at the facility but no painting was being performed. On May 2, 2001, Smith again contacted TNRCC and reported painting ongoing. TNRCC returned to the facility and conducted an inspection resulting in a Notice of Enforcement issued to Respondent for failing to comply with requirements regarding surface coating operations. (Tr. 129-131; CX-9, page 2). Complainant testified he believed TNRCC cited Respondent for painting with the doors open and for maintaining saturated filter pads and an inoperable exhaust fan. (Tr. 137). Smith stated he smelled fumes on a daily basis from the beginning of his employment. Although the fumes bothered him, he affirmed his main complaint was paint overspray on his "new" vehicle. (Tr. 139).

On May 2, 2001, Mr. Piehl approached Smith in Respondent's parking lot and asked "What the hell are you trying to do Mr. Tim?" Smith replied "What the hell does it look like." (Tr. 135). Mr. Piehl stated "it looks like you're trying to shut us down . . . I just don't think that Boy's Ranch or Dale Carnegie

would have taught you to handle it this way." Mr. Piehl further commented that he thought it was "a chicken shit way for you to handle" the matter, presumably by contacting TNRCC. (Tr. 135-136). Smith stated Boy's Ranch and Dale Carnegie taught him morals and principles, "neither of which you [Mr. Piehl] have." (Tr. 136). Mr. Piehl stated "I just wish you would have come to me about this." Complainant replied in a sense he did, because he informed Mr. Aderholt of the overspray damaging his vehicle. (Tr. 137).

On May 3, 2001, Mr. Piehl informed Complainant that he should go home for a "cooling off period." (Tr. 52).

Complainant testified his only contact with OSHA occurred on May 1, 2001. (Tr. 139, 145). He complained about open flame gas heaters, loading bay employees painting which exposed him and others to fumes and the fact that there were no respirators available in the area. (Tr. 140-141). He alleges Respondent knew he had complained to OSHA about these events. He understands that Respondent's response to OSHA was that painting did not occur between 8:00 a.m. to 5:00 p.m. daily. (Tr. 142). OSHA did not cite Respondent with any violations after investigating the complaints. (Tr. 143). Complainant further testified that at the July 31, 2001 meeting, he informed Respondent he had complained to OSHA. (Tr. 144-145).

On July 31, 2001, Complainant met with Mr. Piehl, Mr. Aderholt and Mark Griffin about returning to work after a three-month "cooling off period." (Tr. 145-146). He recalls Mr. Aderholt read a job description which was essentially the same job he performed before the cooling off period, except he would no longer manage the decal employees because he had complained about not having time to do so. (Tr. 146). Complainant disputed voicing any complaints about the decal employees which he noted "freed his time up."

When asked if he had anything to say, Complainant began going through a list of things that he felt were wrong. (Tr. 147; See CX-19). He informed Mr. Piehl that employees, who had not been with the company as long as he, were parking out front, which he did not feel was right. He complained he had no office for awhile and had to perform his duties in the decal area. He stated he was hired as quality control and Mr. Piehl referred to him as "the decal man." He requested a computer on several occasions which had taken two to three years to obtain, and needed access to the internet because customers wanted to communicate on the internet, but was not allowed access. (Tr. 149). He complained of other employees being hired, given better

positions and placed in a flow chart above him, which he did not feel was right. (Tr. 149-150).

Complainant reported he had not been allowed to do the job he was hired to do and would not do Mr. Piehl's dirty work and "would not kiss his ass." He accused Respondent's officials of ransacking his desk after he contacted TNRCC and taking away the quality control camera used to take photographs of overspray and other events. He reported Respondent's shop foreman was out in the shop telling everyone they could thank "their buddy Tim" for calling OSHA. He testified that in the past Mr. Piehl remarked if Smith ever did any work, he could accompany Mr. Piehl and Mr. Aderholt on a trip, but he did not want to go on any glamour trips which may be offered as a perk. (Tr. 150). Smith told Mr. Piehl that he did his work and did not think Mr. Piehl should have made such a statement. (Tr. 151).

Smith felt degraded when a NASA representative invited him to lunch, but Mr. Piehl changed the plans from which he was excluded. (Tr. 151). He recalled a discussion about his breaks being taken in the shop area and that Mr. Piehl did not want him doing so in the future. His pay was discussed, but he did not ask for a raise during the meeting. He informed Mr. Piehl that since he and Mr. Aderholt had lied to him on several occasions, "what I would like you all to do is to put something in writing stating basically my rate of pay, my position with the company, my job description and that you wouldn't retaliate against me anymore for calling TNRCC and OSHA." (Tr. 152). Smith stated he wanted something in writing "so that an attorney could review it." (Tr. 153).

Smith testified that Mr. Piehl maintained a rifle behind his desk which made him feel intimidated, but he did not ask that the rifle be removed during the July 31, 2001 meeting. (Tr. 160-161). His complaints to TNRCC and OSHA were not mentioned by anyone from Respondent during the meeting. (Tr. 161-162).

On August 10, 2001, Complainant received a letter dated August 6, 2001, from Mr. Piehl informing him Respondent would not engage in a written contract for his services and, because of his demands, Respondent regretted that he had abandoned his interest in employment with Respondent. (Tr. 155-156; CX-13). Smith testified he did not ask for a written contract. (Tr. 156).

As a result of the August 6, 2001 letter, Complainant wrote to Mr. Piehl that he did not inform company officials he had quit or abandoned his job. (Tr. 157; CX-28). He reiterated his

request that Mr. Piehl put in writing he would not retaliate against him for calling OSHA or TNRCC, however, he "did not in any way give [Mr. Piehl] an ultimatum of any kind." He informed Mr. Piehl he was still waiting for a confirmation from Respondent of a return to work date and "did not in any way abandon [his] position at [his] place of employment." The letter was annotated as received on August 11, 2001. (CX-28).

Complainant thereafter called OSHA and filed a complaint about his termination. (Tr. 159; ALJX-1).

Smith offered written repair estimates of damages to his vehicles from overspray. (Tr. 164, 182-183; CX-24). Photographs of the loading bay area while painting was ongoing were offered into evidence. (Tr. 165-168; CX-30, pp. 1-2, CX-31). Smith also offered documentation from TNRCC which was received into evidence for the limited purpose of establishing prior complaints and investigations made against Respondent in 1996. (Tr. 169-170, 183-185; CX-5). In conjunction with his testimony, Smith offered a letter dated November 5, 2001, from OSHA regarding its investigation into his complaint filed against Respondent on May 1, 2001. (Tr. 173-175; CX-1).

On cross-examination, Complainant acknowledged he was not happy about his pay from the commencement of his employment in 1995 to the summer 2001. (Tr. 187-188). Having previously filed complaints with OSHA at other employment locations, he acknowledged he was familiar with filing complaints by phone with OSHA. (Tr. 191). He confirmed he informed OSHA and TNRCC that he was totally dissatisfied with their investigation of his complaints. (Tr. 193-195). He affirmed he was upset after speaking with Mr. Aderholt in early 2001 that he was not going to receive a wage increase. (Tr. 195-196). He acknowledged informing Respondent he would not work on Saturdays or after 5:00 p.m. without overtime pay and did not do so, but was not retaliated against by Respondent. (Tr. 201).

He denied ever having any conversations with Mr. Piehl or Mr. Aderholt about his attitude at work or his performance as quality control manager. (Tr. 202-203).

During his conversation with Mr. Piehl on May 2, 2001, Complainant clarified that Mr. Piehl's references to Boy's Ranch and Dale Carnegie were reflective of his attendance of high school at Boy's Ranch and attendance at a Dale Carnegie course in about 1997. (Tr. 204).

Complainant acknowledged he was told of Respondent's concern

about him taking breaks in the shop from the beginning of his employment. He further acknowledged the parking space issue raised at the July 31, 2001 meeting occurred "quite some time" before the meeting. (Tr. 207-208). He further stated Mark Griffin and Darrell Gaddy, unlike Smith, were not required to work in the shop, but were allowed to work in the office for two to three years before the July 31, 2001 meeting. (Tr. 208-209).

In his written complaint to OSHA, Complainant acknowledged he wanted four items put in writing during the July 31, 2001 meeting. He requested his job title, job description, rate of pay and that he would not be retaliated against for calling OSHA and TNRCC. (Tr. 214).

Complainant worked at various other employers, to include Holiday Inn, Marsh Enterprises as a ranch hand, at Affiliated Foods and with his brother, but never received a written contract reflecting his rate of pay and job description from any of the above employers. (Tr. 217-219).

Complainant denied stating he "would come back at [Respondent]" with everything he knew about the company's alleged illegal activities if they refused to agree they would not retaliate against him. (Tr. 222).

Complainant has sought employment through the Texas Work Force Commission, but has not obtained any employment. (Tr. 225). He acknowledged he has drawn unemployment compensation benefits. (Tr. 226). He has sought employment as a quality control person with Allstate Insurance and has sought employment as a ranch hand. He has also sought jobs by perusal of the newspaper and the internet. (Tr. 228).

William Piehl[3]

Mr. Piehl, who is the president of Respondent and has been in business since 1963, was called as an adverse witness by Complainant and questioned about various complaint allegations. (Tr. 17, 63).

Concerning "calibration tools and falsification of documents," Mr. Piehl denied he and Steve Aderholt informed Complainant that certain test results were false and Complainant would have to "pencil whip" the results. (Tr. 24). He testified during a

[3] Mr. Piehl's name is misspelled in the transcript as "Piehle."

cooling off period beginning May 3, 2001, Complainant's weekly paycheck was mailed on time each Wednesday. (Tr. 26).

Concerning Complainant's complaint allegation attributable to Darryl Gaddy (paragraphs 4 and 6), Mr. Piehl denied Mr. Gaddy complained to him about paint overspray on his vehicle or that Mr. Gaddy gave Complainant the phone number to the TNRCC. (Tr. 31). Mr. Piehl also denied Mr. Gaddy informed him Complainant was taking pictures before the inspection conducted by TNRCC. (Tr. 32). He further denied he told OSHA that Respondent only painted during certain times of the work day. Id.

Mr. Piehl testified he had knowledge Complainant contacted TNRCC. (Tr. 34). He was aware that the complaint was about paint fumes and overspray inside the plant. (Tr. 35).

He acknowledged that on May 2, 2001, he had a conversation with Complainant in the company parking lot. He informed Complainant that Boy's Ranch and the Dale Carnegie Course would not have taught him "to handle a complaint the way" it was handled. (Tr. 35-36). He admitted telling Complainant that he thought it was "chicken shit" "the way [Smith] handled the complaint," but did not regard the comment as intimidating. (Tr. 36). Mr. Piehl admitted he approached Complainant about the TNRCC complaint and asked Complainant if he was trying to put "us out of business" or trying to shut down the company. (Tr. 27).

Mr. Piehl acknowledged Respondent has bled off gases into the atmosphere in the past, but did not know if TNRCC officially "noticed" that activity as a violation on May 2, 2001. (Tr. 36-37).

He testified he did not ask Complainant why he refused to sign off on a NASA trailer and was not aware that Complainant had refused to do so. (Tr. 37-38). Complainant's desk was cleaned out after he left for his cooling off period, but he did not personally go through the desk. (Tr. 40).

Mr. Piehl was not aware of any complaint to OSHA on May 1, 2001. He knew Complainant had made complaints in the year 2001 to OSHA, and that Respondent had received a notice of violations, but did not know about the specifics of Complainant's complaint. (Tr. 43, 45).

On May 3, 2001, Mr. Piehl called Complainant into his office for a discussion. (Tr. 52). He informed Complainant he "ought to go home and have a cooling off period." Mr. Piehl testified he was upset about Smith's "attitude and stuff had been going on at least

since December [2000], and so I thought it was best that you go home and think about it, come back and make a good, loyal employee and say I'm ready to get on with it." (Tr. 53). Mr. Piehl and Mr. Steve Adelholt had "several talks" about Smith's attitude, who was upset because he had not received a raise and informed Respondent that he would not work on Saturdays. Id.

Initially, when asked by the undersigned whether Complainant's filing of complaints with outside agencies against Respondent had anything to do with his attitude, Mr. Piehl responded "I don't know . . . I mean, his attitude -- he had a bad attitude. I'm assuming that's the reason he complained to them." (Tr. 54-55). Mr. Piehl informed Complainant that he wished he would have come to him first, rather than going to a government agency. Mr. Piehl subsequently stated that Complainant had a bad attitude from the date of his hire, five years before the cooling off period. (Tr. 55-56).

Although Complainant was on a "cooling off period" for about three months, the company continued to pay his salary. Mr. Piehl acknowledged that after about three and a half months of the cooling off period, Complainant contacted him in an effort to return to work. (Tr. 58).

On July 31, 2001, a meeting was held with Complainant to discuss his return to work. An OSHA inspection occurred on July 30, 2001, which is the reason why the meeting with Complainant could not be held on that day. Mr. Piehl testified the OSHA inspection was not a motivating factor in the termination of Complainant's employment. (Tr. 58-59). He did not meet with Tom Nystel, the OSHA inspector, but did meet and have a conversation on July 30, 2001, with "the OSHA guy." (Tr. 59-60). (Tr. 59). He testified the inspector did not ask for Complainant by name before commencing the inspection. (Tr. 61).

Mr. Piehl acknowledged he did not inform Complainant on what day to return to work after commencing the cooling off period. He further acknowledged that during the meeting of July 31, 2001, Complainant never uttered the words "I quit." (Tr. 62).

Mr. Piehl testified Respondent had legitimate non-discriminatory business reasons for terminating the employment of Complainant. He testified Complainant made demands on the company at the July 31, 2001 meeting, which included a written contract with guarantees of his rate of pay, his job description and a statement that he would not be retaliated against. (Tr. 64). Complainant informed Mr. Piehl that after receiving the written guarantee he would run it by his attorney. (Tr. 65). Mr. Piehl stated Respondent had "never given anybody a written contract of any of those demands, either top management or our other people."

Id. Mr. Piehl concluded Respondent could not meet the demands Smith had requested, but did not so inform him at the meeting. Id.

Mr. Piehl affirmed that Complainant did not state he would quit his job if written guarantees were not provided by Respondent. (Tr. 66). However, according to Mr. Piehl, Complainant stated he would not return to work unless the written contract and guarantees were met. (Tr. 67). After the meeting, Mr. Piehl sent a letter to Complainant advising him that, in view of his demands, Respondent felt he had abandoned his job. (Tr. 66-67).

Mr. Piehl testified that in 1996 a complaint was filed with the TNRCC by a resident across the tracks from the plant who complained about the smell of fumes. (Tr. 70-71). Mr. Piehl stated he had never had a complaint about overspray on vehicles until Complainant complained of that activity. (Tr. 68). Mr. Piehl further denied ever telling Mr. Gaddy before the July 31, 2001 meeting that Complainant was fired. (Tr. 73).

Mr. Piehl stated it was not his intent to place Complainant on a cooling off period forever, but intended to recall him after three months. (Tr. 72-73). He did not hire anyone to replace Smith during the cooling off period. (Tr. 73).

Mr. Piehl did not feel harassed by Complainant because he had filed a complaint with TNRCC and was not angry by the complaint filed. (Tr. 78).

Mr. Piehl acknowledged the company has had problems in the past with painting while the doors were open, but that Respondent had never before been cited for such activity. (Tr. 81). He further denied calling employee Ruben Perez into his office and threatening his job if he testified at the instant hearing. (Tr. 85).

Mr. Piehl confirmed that at the July 31, 2001 meeting, Complainant was informed he would no longer supervise two decal employees because he had complained he did not have time to do so with his other duties. Mr. Piehl admitted telling an OSHA inspector that Complainant was placed on a cooling off period because he had become argumentative. (Tr. 86).

Mr. Piehl stated Complainant was very “argumentative” with other employees at the plant. He did not recall whether or not he informed an OSHA inspector that Complainant was trying to tell him how to run his business. (Tr. 87). He affirmed that Smith had never received a verbal reprimand or been written up for not

performing his job. (Tr. 88-89). Lastly, he testified he did not discharge Complainant from employment with Respondent. (Tr. 91).

Steve Aderholt[4]

Mr. Aderholt is Respondent's Vice President of Sales and Production, a position he has held for 15 years. (Tr. 95). He was Complainant's direct supervisor and hired Smith as an employee of Respondent. (Tr. 96).

He testified Respondent is a re-test facility for compressed gas transport to truckers. Respondent provides five-year re-certification on cylinder tube trailers, reconditions chassis, puts them back in like-new condition and ships them out. (Tr. 231). The facility consists of an office, a main shop where "all fabrication and most of the work" is performed with a paint shop approximately 300 yards from the main office and a separate grit blast shop. (Tr. 231-232).

Complainant was hired as a quality control technician with job duties to run sampling for cleaning of cylinders, leak- checking trailers and making decals. (Tr. 232).

At the end of 2000, Complainant approached Mr. Aderholt and requested a raise in wages. (Tr. 232). Complainant informed Mr. Aderholt that he felt "too bogged down in making decals to be able to really perform his other functions or add to those functions." Afterwards, Respondent hired two part-time decal persons, a college student and a high school student. (Tr. 233). Mr. Aderholt testified Complainant did not receive a raise in wages. (Tr. 234).

In early January or February 2001, Mr. Aderholt informed Mr. Piehl that quality control would have to change because he did feel they "were progressing in that area as they should." He did not "feel like all inspections were being made, didn't know about leak-checks being made." Mr. Smith initiated "a QC notation" on the bottom of bills of lading indicating that quality control had inspected the item before leaving Respondent's facility. However, Complainant was having difficulty keeping up with the inspections and annotations. (Tr. 235).

In February 2001, Complainant again approached Mr. Aderholt about a wage increase. He "tried to impress upon Smith that I didn't feel like the quality control program was going where I

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[4] Mr. Aderholt's name is misspelled in the transcript as "Adrholt."

thought it needed to be." (Tr. 236). He stated it "basically seemed like all I got was excuses." He testified the meeting deteriorated with Complainant announcing he was "not working any more Saturdays or after five o'clock until I get a raise." He stated Complainant became hostile toward him when he commented "there's a few things that I didn't like, and I'd like to see improved" in the quality control program. (Tr. 237).

Mr. Aderholt affirmed he did not require Smith to work on Saturdays or after 5:00 p.m. subsequent to his announcement that he would not do so. Id. However, he expressed concern to Mr. Piehl because of Respondent's workload and the need to "leak test"/inspect trailers with Complainant not present on Saturdays. (Tr. 104, 238). Mr. Aderholt did not place any notations in Smith's personnel file, reduce his pay or take any other action against him for not working Saturdays or after 5:00 p.m. during the weekdays. (Tr. 238).

On or about April 24, 2001, Mr. Aderholt testified Complainant told him painting was being conducted with the doors open. He drove to the paint shop and verified painting was being conducted with the front door open, which he then closed and informed workers that they had to keep the paint doors shut. (Tr. 96, 239). Mr. Aderholt confirmed Complainant only reported painting being conducted with the doors open on one occasion. (Tr. 99). He testified Complainant did not report damage to his vehicle or having difficulty breathing toxic fumes. (Tr. 96). Mr. Aderholt did not inform Complainant that overspray was part of working at the company. (Tr. 97, 105). He did not inform Complainant that the summer was coming and therefore the doors would be open even more. (Tr. 98).

Mr. Aderholt denied informing OSHA that Respondent was not using the paint shop or telling TNRCC that the company does not release gases as part of their process. (Tr. 99-100). He acknowledged Respondent bleeds off excessive gas from cylinders. (Tr. 100). Mr. Aderholt further testified he did not inform OSHA that painting does not occur in the loading area between 8:00 a.m. and 5:00 p.m. (Tr. 101).

He recalls on occasion Complainant refused to sign off on a trailer after inspecting the trailer, but he was not angry with Complainant for having done so. (Tr. 104). He never recalls telling Complainant to "pencil whip" any paperwork. (Tr. 105). He stated no other employees complained to him about any overspray from the painting being conducted in the paint shop. (Tr. 105-106). Mr. Aderholt denied telling Complainant that he should have put his foot down a long time ago and he would not have signed off

on the trailer inspections either. (Tr. 110-111).

Mr. Aderholt testified that in about 1994 or 1995 Respondent received complaints from "someone across the railroad tracks" about paint fumes in the air. (Tr. 106). After TNRCC visited the facility with a complaint of paint odor emanating from the plant, Mr. Aderholt corresponded with TNRCC on September 8, 1997, acknowledging the rear door of the paint shop was open and that filters were missing in our exhaust fan." (Tr. 107-108; CX-8). As a result of the inspection, it was determined the paint shop policies would be "stiffen" to include practices of changing filters on a regular basis with no painting being performed until and unless all filters were in place and the paint bay door would remain closed until all paint fumes had been filtered through the exhaust system. (CX-8).

Mr. Aderholt affirmed that many years ago, Respondent had open-flame heaters, but could not recall having such heaters in the last two to three years or specifically during 2001. (Tr. 109).

Mr. Aderholt acknowledged Respondent was cited on May 2, 2001 because filters were not in place during the inspection by TNRCC. (Tr. 114). He did not recall informing Complainant the exhaust fan and lighting were inadequate in the paint shop which was the reason the doors remained open during painting. (Tr. 115-116).

Mr. Aderholt acknowledged that on May 3, 2001, Complainant was given a "cooling off period," however he was paid by check, which was mailed to his home. Tr. 240). He testified the cooling off period lasted three months because he, Mr. Piehl and Mr. Griffin were not available to discuss Complainant's return to work in view of their schedules and travel commitments. (Tr. 240-241). To his knowledge, Smith was not given a date to return to work after being sent home for the cooling off period. (Tr. 103-104).

During the July 31, 2001 meeting at which Complainant's return was discussed, Mr. Aderholt acknowledged Complainant did not state he was going to quit his employment with Respondent. (Tr. 104). He recalls leading a discussion about Smith's job duties which "was basically going to be doing exactly the same thing as before the leave, with the exception of one thing, and that was he didn't have any responsibility for decals." (Tr. 242). A decision had been made that the decal men did not require supervision because they had a good handle on their work and therefore Complainant would not be required to supervise their activities and have more time for quality control duties. (Tr. 241-242).

Mr. Aderholt testified Complainant's attitude deteriorated

during the meeting. Smith first began "griping at Bill [Piehl] about where he had to park." Complainant informed Mr. Piehl and Mr. Aderholt that he had a hard time believing they wanted him to return to work. (Tr. 244). Smith stated he felt "blacklisted" and "discriminated against." Smith mentioned an organizational chart which no longer had his name on it, that after TNRCC inspected the facility his desk was ransacked and Mr. Piehl had informed him "if he worked hard he'd get to go on glamour trips," but had complained about where Smith took his breaks. He also raised a luncheon with quality control customers from which he was excluded. (Tr. 245-247).

At the meeting, Complainant stated he did not trust anyone at Respondent and wanted "things like rate of pay, job title, position, and so forth . . . in writing in a written guarantee." Complainant stated if he did not get these demands, "I'm going to tell all I know." (Tr. 247). Mark Griffin asked Complainant "what do you mean? . . . are you coming back to work or not?" Complainant responded "I want all these things written down and I want a written guarantee before I'll come back to work." Smith stated he would give the written guarantee to his lawyer to review. Mr. Aderholt testified they did not give Complainant anything in writing because it is not company policy to have any kind of written guarantees. (Tr. 248-249). Mr. Aderholt does not have a written work guarantee nor does anyone he knows with Respondent. (Tr. 249).

On cross-examination, Mr. Aderholt acknowledged the change in supervision and responsibility for the decal activities occurred on July 31, 2001, which was after Complainant's complaint to TNRCC. (Tr. 250). He also acknowledged Complainant would sometimes become angry in his attitude and raised his voice in discussions, but Complainant had never been issued a reprimand about his conduct or work. (Tr. 253-254). Mr. Aderholt did not feel Complainant was meeting all quality control standards required. (Tr. 254).

Mark Griffin

Mr. Griffin is vice-president of Respondent, a position he has held for one year. He was hired in April 1998. (Tr. 256). He attended meetings with Mr. Piehl and Mr. Aderholt in January 2001 where quality control was discussed as well as the July 31, 2001 meeting concerning Complainant's return to employment. He was present at the hearing as Respondent's representative and heard the testimony of Mr. Piehl and Mr. Aderholt to which he expressed agreement. (Tr. 257).

On cross-examination, Mr. Griffin testified Smith told him

about overspray on his truck and that Smith had informed Mr. Aderholt about the overspray. (Tr. 259).

The Contentions of the Parties

Complainant contends he engaged in protected activity under the employee protective provision of the CAA because he voiced concerns to Respondent about paint fumes and overspray caused by painting with plant doors opened and filed external complaints with TNRCC and OSHA about those concerns.

In his complaint filed with the undersigned, Smith alleges on July 30, 2001, Respondent blacklisted him when Mr. Piehl inform Tom Nystel, an OSHA representative, that Smith was a disgruntled employee. He claims he was intimidated at the July 31, 2001 meeting because Mr. Piehl maintained a rifle behind his desk about which Smith alleged he was bothered and had complained in the past. He further contends he was restrained from performing his job duties on July 31, 2001, because he was informed he would no longer manage the two decal employees and further restrained because Respondent never gave him a date on which to return to work. He also claims Respondent informed him on July 31, 2001, that he would be subjected to performing illegal acts because he would maintain the same job description as before his cooling off period and thereby forced to falsify government documents.

Lastly, Smith contends Respondent violated "federal statutes" on August 8, 2001, by discharging him for participating in protected activity of refusing to perform an illegal act, reporting violations "**occurring in the paint facility**" to TNRCC and informing OSHA of violations which were "clear and present danger[s]" to him and his co-workers. (ALJX-3).

Respondent contends that Complainant's actions do not conform to activities protected by the CAA. Moreover, Respondent argues Smith's concerns do not come within the parameters of the CAA because the concerns expressed were personal in nature and wholly unrelated to the public health and welfare of which the CAA was designed to protect.

Respondent argues Complainant failed to prove he engaged in protected activity under the CAA. Initially, Respondent notes that since the "illegal act" relied upon by Smith as a basis of his discharge in paragraph 1 of his complaint was dismissed as untimely, no admissible evidence was presented at the hearing relating to the alleged refusal to perform an illegal act. Respondent further avers Smith's second basis for his discharge, i.e., complaints to TNRCC about violations "**in the paint facility**,"

do not fall within the purview of the CAA and Smith cannot show he reasonably sought to enforce any requirement imposed by the CAA. Finally, Respondent argues that reports to OSHA do not constitute protected activity under the CAA and, moreover, Respondent had no knowledge of Complainant's complaints to OSHA before July 31, 2001.

Respondent advances an argument that it articulated a legitimate, nondiscriminatory reason for its action since Smith made demands for his return to work which included a written guarantee about his rate of pay and job description that was not in conformity with company policy. Respondent considered Smith to have abandoned his job because he stated he would not return to work unless his demands were agreed upon in writing. Respondent avers Complainant proffered no evidence to rebut or to show that its legitimate business reason of considering Smith as having abandoned his job was a pretext.

Lastly, Respondent argues, if it is determined that Respondent violated the CAA, reinstatement should be denied as inappropriate because of "discord and antagonism between the parties" and the demonstration of an "impossibility of a productive and amicable working relationship."

IV. DISCUSSION

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the

test of plausibility.

442 F. 2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard to the logic of probability and the demeanor of witnesses.

A. The Applicability of the Clean Air Act

Although commonly known as the Clean Air Act, the statute was passed by Congress as the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970), amending the 1967 Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485 (1967). The 1970 legislation was later amended in 1977 and 1990.

The CAA only gives the Environmental Protection Agency (EPA) authority to regulate "air pollutants," and defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is **emitted into or otherwise enters the ambient air."** See 42 U.S.C. § 7602(g)(emphasis added). See Johnson v. Old Dominion Security, Case No. 1986-CAA-3 @ 8, n. 8 (Sec'y May 21, 1991)(complaints about contamination of workplace air, contained within a building, structure, facility or installation which is not emitted into the external atmosphere, would not be covered under the CAA).

The CAA establishes National Ambient Air Quality Standards (NAAQSs) applicable on a nationwide basis. 42 U.S.C. § 7602(u). These standards are referred to as "harm-based" because the mandated quality levels are set by reference to ambient levels of pollutants that would limit harm to human health and the

environment to acceptable levels.[5]

The NAAQS regulations define "ambient air" as "that portion of the atmosphere, **external to buildings**, to which the general public has access." 40 C.F.R. § 50.1(e)(emphasis added). Moreover, the EPA's regulations governing air pollution define it as "the presence in the **outdoor atmosphere**" of pollutants. 40 C.F.R. § 35.501-1 (4th Ed. 1972)(emphasis added). See Kemp v. Volunteers of America of Pennsylvania, Inc., Case No. 2000-CAA-6 @ 4 (ARB Dec. 18, 2000).

Indoor pollution has been the subject of recent comment in which it was recognized that the "impact of individual pollutants depends on a number of factors such as toxicity, concentration, duration of exposure and sensitivity of those exposed . . . Over time, these emissions, called 'off-gassing' gradually decrease." "Insufficient ventilation, resulting in poor air exchange, can intensify indoor air pollution." [6] However, the "CAA provides very little protection for those exposed to indoor air pollution. The CAA improves indoor air indirectly through its programs to lower the concentrations of air pollution in the outdoor or ambient air." "Indoor air in the workplace is subject to regulation under the OSH Act. The OSH Act applies to most private sector businesses." [7]

It has been observed that "the EPA . . . has consistently limited itself to regulating outdoor air quality under the Clean Air Act . . . because ambient air has universally been construed to mean the outdoor air." [8] Moreover, it has been recognized

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[5] Zygmunt J.B. Plater, et al., Environmental Law and Policy: Nature, Law and Society, at page 441 (2d Ed. 1998). Therein, the authors validate the Clean Air Act does not address indoor air quality. Id., n. 1.

[6] The federal government currently has no standards for ventilation, and it is therefore regulated by local building codes which may address concerns other than indoor air quality. See Office of Air and Radiation, U. S. Environmental Protection Agency, Fact Sheet: Ventilation and Air Quality in Offices. (April 2, 1997).

[7] Arnold W. Reitze, Jr. and Sheryl-Lynn Carof, The Legal Control of Indoor Air Pollution, 25 B.C. Envtl. Aff. L. Rev. 247, at 249-250, 254, 258 (1998).

[8] Laurence S. Kirsch, The Status of Indoor Air Pollution Litigation, C432 A.L.I.-A.B.A. 317, 358-359 (1989).

that the EPA "has never attempted to regulate **indoor** air quality under the auspices of the Clean Air Act and no statute currently grants it unambiguous authority to do so. The CAA gives the EPA authority to regulate any pollutant that enters the ambient air." [9] Yet, EPA regulations interpreting the CAA are specifically tailored to addressing only problems in **outdoor** air. [10]

Complainant's complaint alleges clean air violations "**in the paint facility**" of Respondent's plant. (See Paragraph 13, ALJX-3). At the hearing, Complainant expanded the scope of his allegations to include some undefined areas outside the plant into which vapors, fumes and paint "overspray" may have been dispelled through ventilation fans and open doors. Assuming, **arguendo**, that any amounts of vapors, fumes or paint "overspray" escaped into the outdoor atmosphere, there is no evidence as to the toxicity involved in such materials, whether such vapors, fumes or "overspray" constituted measurable concentrations or just negligible amounts of "pollutants" or whether such "contaminants may have caused any adverse effects on the health of the general public by duration or resulting sensitivity. [11]

Accordingly, in view of the foregoing, I am constrained to find and conclude that the Clean Air Act is inapplicable to any **indoor** air quality complaints and the alleged speculative, residual outdoor contamination which forms the basis of Complainant's complaint. Complainant's reliance upon complaints of fumes and smells by Respondent's "neighbors" in 1996 in support of a pattern, practice or failure of Respondent to comply with past citations in connection with the events allegedly occurring in 2001 is too temporally remote and is unpersuasive. Consequently, I further find and conclude that Complainant's actions do not conform to the activities protected by the

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[9] Steve Kelly, Indoor Air Pollution: An Impetus for Environmental Regulation Indoors?, 6 BYU J. Pub. L. 295 (1992).

[10] See Grace C. Guiffrida, The Proposed Indoor Air Quality Acts of 1993: The Comprehensive Solution to a Far-Reaching Problem?, 11 Pace Envtl. L. Rev. 311 (1993).

[11] Although the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994), provides minimal control over indoor air, it is concerned primarily with the control of releases into the environment which includes the ambient air. However, the term "release" excludes "any release which results in exposure to persons solely within the workplace . . . ."

employee protective provisions of the CAA.

Notwithstanding the foregoing, arguably Complainant's claim may come within the purview of the Clean Air Act if he reasonably perceived Respondent violated the CAA. See Aurich v. Consolidated Edison Co. of New York, Inc., Case No. 1986-CAA-2 @ 3 (Sec'y Apr. 23, 1987); Minard v. Nerco Delamar Co., Case No. 1992-SWD-1 @ 5 (Sec'y Jan. 25, 1994). However, the Act does not protect an employee who subjectively thinks the complained of employer conduct might affect the environment. Crosby v. Hughes Aircraft Co., Case No. 1985-TSC-2 @ 26 (Sec'y Aug. 17, 1993); Kesterson v. Y-12 Nuclear Weapons Plant, Case No. 1995-CAA-12 @ 2-3 (ARB Apr. 8, 1997). "The substance of the complaint determines whether activity is protected under the particular statute in issue." Johnson v. Old Dominion Security, supra, @ 5. Accordingly, I shall consider whether Complainant is entitled to a finding and conclusion that Respondent discriminated against him for his alleged activity based on this perception.

B. Complainant's Prima Facie Case

The protective employee provision of the Clean Air Act, in pertinent part, provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . .
>
> > 1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter. . .
> >
> > 2) testified or is about to testify in any such proceeding, or
> >
> > 3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

The Secretary of Labor has repeatedly articulated the legal framework under which parties litigate in retaliation cases. Under the burdens of persuasion and production in whistleblower proceedings, Complainant must first present a **prima facie** case of retaliation by showing:

> 1) that the Respondent is governed by the Act;
>
> 2) that Complainant **engaged in protected activity** as defined by the Act;
>
> 3) that the Respondent was aware of that activity and took some adverse action against Complainant; and
>
> 4) that an inference is raised that the protected activity of Complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, Case No. 1994-CAA-4 @ 3-4 (Sec'y Sept. 19, 1995); Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995).

Respondent may rebut Complainant's **prima facie** showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter Respondent's evidence by proving that the legitimate reason proffered by the Respondent is a pretext. See Yule v. Burns International Security Service, Case No. 1993-ERA-12, @ 7-8 (Sec'y May 24, 1994). In any event, Complainant bears the burden of proving by a **preponderance** of the evidence that he was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Dean Darty v. Zack Company of Chicago, Case No. 1982-ERA-2, @ 5-9 (Sec'y Apr. 25, 1983)(citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981)).

Since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether Respondent rebutted that showing. See Carroll v. Bechtel Power Corp., Case No. 1991-ERA-46, @ 11, n. 9 (Sec'y Feb, 15, 1995), aff'd sub nom. Bechtel Power Corp. v. U. S. Department of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996).

Once Respondent has produced evidence that Complainant was

subjected to adverse action for a legitimate, nondiscriminatory reason,[12] it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a **prima facie** case. If he did, whether he presented a **prima facie** case is not relevant. Adjiri v. Emory University, Case No. 1997-ERA-36 @ 6 (ARB July 14, 1998).

The undersigned finds as a matter of fact and law that Respondent is a covered employer within the meaning of the CAA. Respondent does not contend otherwise. Moreover, I further find Respondent has articulated a legitimate, nondiscriminatory reason for its actions.

The pivotal issue is whether Complainant prevailed on the ultimate question of liability by a **preponderance** of the evidence. I find that he did not.

As noted above, the substance of Complainant's complaint determines whether his activity is protected under the CAA. Since Complainant proceeded pro se, a brief analysis of the elements of his **prima facie** case is warranted.

Smith conceded that he had smelled fumes during his entire employment with Respondent and, although it "bothered" him, he never filed any internal or external complaints about the fumes until late April or May 1, 2001. He had observed paint overspray on his old vehicle before May 1, 2001, but it did not bother him and he never complained about it because his vehicle was old. I find his motivation on May 1, 2001, was personal in nature in that the substance of his voiced concerns was about paint overspray on his "new" vehicle. The record is devoid of any evidence of the toxicity or amount of paint fumes and overspray external to the paint department and there has been no showing of any "adverse effects on the health of the general public," which are persuasive factors in measuring the impact of pollution in

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[12] Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for Respondent. Texas Department of Community Affairs v. Burdine, supra, at 253, 256-257. However, Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id.

the ambient air protected by the CAA.

The record is clear that Respondent was aware of Complainant's complaints to TNRCC as expressed by Mr. Piehl in the company parking lot where he exhibited animus or hostility toward Smith for having made such reports to an outside investigative agency rather than to Mr. Piehl. The timing of Smith's "cooling off" period, the day following the investigation by TNRCC, is persuasive evidence that Respondent retaliated against Smith, in part, for reporting alleged violations. Such a conclusion is buttressed by Mr. Piehl's testimony that Complainant had exhibited a "bad attitude" from the beginning of his employment, and his uncertainty that his "attitude" was inclusive of reporting complaints to TNRCC. Notwithstanding the alleged retaliation, Complainant's compensation was unaffected during the cooling off period. Nevertheless, I find the imposed "cooling off" period constituted an adverse action against Smith, if his activity was protected under the CAA, since his "terms, conditions or privileges of employment" were arguably altered by his exclusion from his work duties and job site.

However, I find and conclude Complainant's subjective perception of an alleged violation under the CAA was "not grounded in conditions constituting reasonably perceived violations" under the CAA. He never expressed a concern that Respondent's conduct might affect the environment. See Kesterson, supra, @ 3.

Accordingly, I find and conclude that Complainant's perception of Respondent's violation of the CAA was not reasonably based. Therefore, I further conclude that Complainant's activity was not protected. Having concluded Smith's complaint activity was unprotected, it is axiomatic such activity could not be the basis for an inference that his activity was a "likely reason for the adverse action" taken against Smith.

Having found Smith's conduct unprotected, since the substance of his complaints were personal in nature and not related to environmental matters, I further conclude that he has not established, by a preponderance of the probative evidence, discrimination against him by Respondent within the meaning of the CAA.

C. Complainant's Submission of Allegations

Smith contends he suffered adverse action in employment with Respondent on the basis of his involvement in three categories of

"protected activity."

Initially, Smith claims he was discharged because he refused to perform an illegal act of falsifying government documents on or about April 18, 2001. This allegation was treated in the Order Granting Partial Summary Decision as untimely raised since, if it occurred, the event pre-dated the thirty (30) day period prior to the filing of Complainant's complaint on August 10, 2001. Accordingly, it can not serve as an independent basis for his alleged unlawful discharge.

Complainant's allegation of "blacklisting" on July 30, 2001, when Mr. Piehl allegedly informed an OSHA investigator that Smith was a disgruntled employee, is not supported by any admissible evidence contained in the instant record. Moreover, Mr. Piehl credibly denied the allegation.

I find Complainant's allegation of intimidation during the July 31, 2001 meeting by the presence of a rifle in Mr. Piehl's office is devoid of merit. Smith did not voice any concerns at the meeting about the rifle nor seek its removal. The complaints he lodged and remedies he sought belie any assertion of prevailing intimidation at the meeting.

Smith's complaints of restraint because of the deletion of his supervisory duties over the decal employees or the failure of Respondent to provide a return to work date are without merit and are subsumed in the following discussion regarding Respondent's legitimate business reason for its action.

Complainant's allegation that Respondent discharged him for informing TNRCC of violations occurring **in the paint facility** or external to the paint facility, as urged at hearing, has not been established by a preponderance of the record evidence. I find that Smith has not shown that he reasonably believed the alleged paint fumes and overspray posed a risk to the general public outside the building. Moreover, the record does not support a finding that Smith reasonably sought to enforce any requirement imposed by the CAA since his activity falls outside the parameters of protected conduct. To the extent Complainant's complaints were limited to paint fumes and overspray as an occupational hazard, the employee protection provision of the CAA would not be triggered. Aurich, supra, @ 3.

Lastly, Smith complains that Respondent discharged him for informing OSHA of violations, including paint fumes in the loading bay, that were of a "clear and present danger to my co-workers and me." The Secretary of Labor and the Administrative

Review Board have addressed complaints regarding occupational safety and health hazards and concluded they are not protected by the CAA, but by the Occupational Safety and Health Act, 29 U. S. C. § 660(c). Kemp, supra, @ 5. The Administrative Review Board has further observed that it has no comparable authority or jurisdiction under the OSH Act, under which the sole whistleblower enforcement mechanism is an action brought by the Secretary of Labor in a United States district court. Id., @ 3; See 29 U. S. C. § 660(c)(2). Therefore, I find and conclude that Complainant's alleged complaints and submission allegations, which form the basis of his OSH Act whistleblowing activity, are not within the delegated authority of the undersigned.

D. Respondent's Legitimate, Non-Discriminatory Business Reasons for Action

Assuming, **arguendo,** that Smith presented a case of retaliation by Respondent under the CAA, which is belied by the instant record, I find and conclude Respondent satisfied its burden of articulating a legitimate, non-discriminatory reason for its action against Smith.

On July 31, 2001, after the three-month paid "cooling off" period, Respondent's officials met with Smith to discuss his return to work. Complainant entered the meeting with a litany of items he believed "were wrong" with Respondent's operation which he intended to voice if given an opportunity. Those complaints are detailed above. Smith informed Mr. Piehl and Mr. Aderholt that since they had lied to him on several occasions, he wanted "something in writing" stating his rate of pay, position with the company, his job description and that they would not retaliate against him for calling TNRCC and OSHA.

Mr. Piehl testified Smith made demands on Respondent at the meeting, which included a written contract with guarantees about his rate of pay, job description and non-retaliation. Respondent has never given any employee a written contract. Mr. Piehl concluded Respondent could not meet Smith's demands. Although Smith did not state he would quit his job if his written guarantees were not provided, Mr. Piehl credibly testified that Smith stated he would not return to work unless the written contract and guarantees were met.

Mr. Aderholt recalled Smith stating that he did not trust anyone at Respondent and wanted certain terms of employment in a written guarantee and without it "would tell all [he] knew." A written guarantee was a prerequisite for Smith's return to work.

Based on a synthesis of the most plausible versions of the July 31, 2001 meeting, I find and conclude Smith demanded terms of his employment be placed in a written document which was a condition of his return to work. His "take or leave" stance on the demands never changed during the meeting. In effect, notwithstanding his denials otherwise, the demands, which were unacceptable to Respondent, were an "ultimatum" without which he would not return to work. Smith acknowledged he had never had a written contract for his services with any other employer. It is undisputed Respondent has never provided such an employment contract to any employee, managerial or rank and file.

Faced with the demands of Complainant, Respondent properly construed Smith's position as an abandonment of his interest in employment in the absence of the written guarantees. On August 6, 2001, Respondent advised Smith that it could not meet his demands. I find and conclude that Respondent's determination that Smith had abandoned his job interest without a written guarantee constituted a legitimate business decision. Since I have further concluded that Smith's activity was not protected under the CAA, the decision of Respondent can not be considered discriminatory.

E. Respondent's Decision Not a Pretext For Discrimination

The record is devoid of any cogent rebuttal evidence that Respondent's employment decision relating to Smith was a pretext for discrimination against him because of his "protected" activity.

V. CONCLUSIONS

I find and conclude Complainant failed to establish by the weight of the record evidence that he was subjected to adverse action by Respondent because of his alleged protected activity. The weight of the probative, credible evidence compels a conclusion that Complainant was not terminated because of his alleged protected activities.

The burden is on the Complainant to establish that adverse action was meted out because of his protected activity. He clearly has not shown by the weight of the evidence that his severance from employment was imposed because of his internal or external complaints regarding paint fumes, vapors or overspray. I so find and conclude.

For the reasons discussed above, I find and conclude that the Clean Air Act is inapplicable to the extant circumstances of this

case. I further find and conclude that Complainant failed to present any evidence to establish he was subjected to adverse employment actions because of his complaint activity, which I find was unprotected under the CAA, or that Respondent's proffered reasons for considering Complainant as having abandoned his employment were a pretext for alleged discriminatory retaliation. Thus, I find and conclude, based on the foregoing analysis, that Respondent properly construed Complainant's demands for documentation of his rate of pay, job description, and non-retaliation as a condition for his return to work which it could not fulfill. Respondent's decision constitutes a legitimate, nondiscriminatory business reason for considering Smith's employment severed, unrelated to his alleged protected activity.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Respondent has not unlawfully discriminated against Tim Smith because of his alleged protected activity and his complaint is hereby **DISMISSED.**

ORDERED this 15th day of May, 2002, at Metairie, Louisiana.

A
LEE J. ROMERO, JR.
Administrative Law Judge